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May 16, 1996

BY HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Erratum to Leased Commercial Access Comments

Dear Mr. Caton:

92-266

On behalf of A&E Television Networks, Courtroom Television Network, NBC Cable, and Ovation, we are filing a revised version of the Comments filed yesterday in MM Docket No. 92-266, CS Docket No. 96-60. Due to a computer system malfunction, the Comments filed at yesterday's deadline contained inadvertent typographical errors. This corrected version should replace the copies filed on May 15.

Sincerely,

Robert Corn-Revere

Robert Corn-Revere

RCR/rcr

Enclosures

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 92-266
Cable Television Consumer Protection	)	CS Docket No. 96-60
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	DOCKET FILE COPY ORIGINAL
Leased Commercial Access	)	

COMMENTS OF CABLE PROGRAMMING COALITION OF A&E TELEVISION NETWORKS, THE COURTROOM TELEVISION NETWORK, NBC CABLE AND OVATION

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Its Attorneys

May 15, 1996

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SUMMARY

Vice President Al Gore and Chairman Reed Hundt recently praised the cable television industry for its service to the public. The principal focus of this praise was cable programming. The Vice President and Chairman said that cable networks had led the way to provide news, public affairs, education and quality entertainment programming to the public. They pointed to a variety of industry initiatives and programming services by name, including Cable in the Classroom, C-SPAN, *A&E Classroom*, and Court TV, among many others. Public policy should support such services, not undermine them.

Today, the primary impediment to even more programming diversity is not the lack of programming services, but the shortage of channel capacity to accommodate additional services that have been or are waiting to be launched. Ironically, the FCC's proposed changes to the leased access rules would only exacerbate the problem of limited channel capacity. Moreover, the proposed rules are not designed to further the statutory goal of diversity; rather, the proposal would require the displacement of existing, diverse services and proposed new networks in favor of leased access programmers that do not have to earn a place on channel lineups by providing unique or high quality popular programming.

The goal of the leased access provisions adopted by Congress in Section 612 of the Cable Act is increased programming diversity. However, leased access was never intended to achieve diversity by damaging the financial health of cable operators or impeding the growth of cable networks. Indeed, such harm will undermine the statute's diversity goals. The quota-based subsidy created by the Commission's

current proposal will harm cable operators and programmers, and it ignores subscriber preferences. The Commission has flexibility to implement the statute in a manner that will provide reasonable access to unaffiliated programmers without these adverse consequences.

The most troubling aspect of the Commission's proposal is the requirement that cable operators create "hit lists" of existing programmers that will be bumped from their systems to make room for leased access programmers. This is clearly inconsistent with the intent of Congress when it adopted leased access requirements. Moreover, the placement of a service on an operator's "hit list" will be the equivalent of a death sentence. Worse still, this programming "death row" will be populated by new and diverse services that, in the past, the Commission has taken particular care to protect.

Rather than fostering diversity, the proposal is "zero-sum" at best. That is, it will result in the substitution of leased access programmers (with whatever programming the *leased access programmer* chooses to provide) for existing programming services (selected by the cable operator based on perceived value to *subscribers*.) The only criterion for carriage is the ability to pay. At worst, all leased access channels on a given system could be used by the same entity to replace various existing services with duplicative services. For example, the FCC's proposed rules could result in displacement of services like A&E, Court TV, CNBC, America's Talking, Ovation and The History Channel in favor of six newly-subsidized home shopping services.

The FCC's proposal for leased access rates is also inconsistent with statutory objectives. The 1992 Cable Act requires the Commission to establish a *ceiling* for leased access rates. By contrast, the FCC's current, bifurcated cost-based/market-based proposal is a quota-based subsidy that sets the *actual* rates to be charged for leased access channels. The "cost-based" element of the FCC's proposal, which would govern leased access rates until an operator's quota of access channels is filled, does not even purport to permit operators to recover all costs associated with the use of a given channel for leased access. Nor does the formula account for subscriber demand or preferences. Moreover, the "market-based" element of the Commission's proposal will create chaos in the access contract negotiation process, but will never be used to set rates in reality.

The Commission's proposal creates a leased access quota to be filled by "favored" programmers in violation of the First Amendment. There is no demonstrated government interest in creating this quota, which will harm existing services. And, there are other, less intrusive means available for promoting diversity. Even under an intermediate level of scrutiny, the Commission's leased access proposal fails under the First Amendment.

The Commission should adopt a more flexible approach to leased access that serves statutory goals without the harsh (and unintended) consequences that attend the current proposal. Its rules should be forward-looking, and take changing marketplace conditions into account. Any leased access rate formula should be based on the following criteria:

1. Do not seek to enforce a quota;

2. Avoid a "Hit List" and recognize the value of tier placement;

3. Any transition to a new formula should not allow bumping existing services or preempting new services;

4. Full time programming services should not be displaced by part time leased access;

5. Avoid solutions that create uncertainty such as the proposed hybrid cost-based/market-based formula; and

6. Integrate leased access into the broader statutory and regulatory framework.

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Leased Commercial Access	)	

COMMENTS OF CABLE PROGRAMMING COALITION OF A&E TELEVISION NETWORKS, THE COURTROOM TELEVISION NETWORK, NBC CABLE AND OVATION

A&E Television Networks (including the A&E Network and The History Channel); Courtroom Television Network ("Court TV"); NBC Cable (including CNBC and America's Talking) and Ovation (together, the "Programmers"), through their attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submit comments in the above-captioned proceeding.

The Programmers believe that the FCC should approach any proposed modifications of its leased access rules as if it were governed by the Hippocratic Oath: First, do no harm. Unfortunately, the Commission's current proposal to change its formula for the maximum reasonable leased access rate would have a severe, if unintended, disruptive effect on programming services and on subscribers. Implementing the proposed cost-based formula would undermine the statutory goal of promoting programming diversity, would conflict with the Commission's prior policies

and would violate the First Amendment. Consequently, the Commission's proposal should be thoroughly reconsidered.

I. CABLE PROGRAMMING AND DIVERSITY

A. The Growth of Programming Services Defines the Public Interest

At the recent NCTA Convention, Vice President Al Gore and Chairman Reed Hundt praised cable television for its service to the public. The common theme for both speeches was that cable television serves the public interest so well because of its *programming*. The Vice President explained that "[o]n educational programming you've set a new standard. Cable in the Classroom serves more than 35 million students -- three out of four American school kids -- and provides more than 500 hours of commercial-free educational programming each month." Vice President Gore noted that "cable programmers have created a wide array of innovative educational programming to support Cable in the Classroom," citing *A&E Classroom*, among others. 1/ Chairman Hundt echoed these sentiments, explaining that "with your many channels and your presence in the classrooms of America, you are helping the country meet the goal of delivering the benefits of the communications revolution to all our

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1/ Prepared remarks of Vice President Al Gore, National Cable Television Association Convention, Los Angeles, California, April 29, 1996 ("Remarks of Vice President Gore").

children." 2/ The Chairman specifically mentioned Court TV as an example of cable's educational efforts.

Vice President Gore also pointed out that cable television's "commitment to news and public affairs programming has also been exemplary." 3/ For example, he described C-SPAN as "every policy wonk's channel of secret thrills and guilty pleasures." "C-SPAN is a national treasure," the Vice President said. "It must be preserved." Chairman Hundt similarly described C-SPAN as "the granddaddy of real-time, unfiltered political coverage of government in action," and praised the extensive news coverage provided by cable programming services that "will help television viewers better understand the impact the media have on the 1996 electoral process." 4/

The signatories to these comments are gratified by the remarks of these two public servants, and strongly agree that the wide diversity of programming services defines the public interest in the context of cable television and other multichannel video services. As described below, each of these programming services contribute to what the Vice President and Chairman have described as "outstanding corporate citizen[ship]." 5/

2/ Speech by Reed Hundt, Chairman, Federal Communications Commission, National Cable Television Association 45th Annual Convention, Los Angeles, California, April 30, 1996 ("Speech of Chairman Hundt").

3/ Remarks of Vice President Gore.

4/ Speech of Chairman Hundt.

5/ *Id.*

A&E Television Networks is a cable programmer that is neither owned nor controlled by any cable operator. It offers both the A&E Network ("A&E"), an established cable network, and a newly-launched service, The History Channel. A&E is currently delivered to more than 66 million cable households throughout the country via cable, TVRO, MMDS, DBS, and SMATV distribution systems. It features critically acclaimed original entertainment programming, including the series BIOGRAPHY®, mysteries, dramatic programs and specials. Over 80 percent of A&E's prime time schedule consists of original productions. The high quality, original programming offered on this network has earned A&E more CableAce Awards than any other basic cable network.

Given the success of A&E and the extraordinary interest expressed by television viewers for a network devoted to historical subjects, 6/ A&E Television Networks launched The History Channel on January 1, 1995. The History Channel is a high-quality programming service featuring historical documentaries, movies and miniseries placed in historical perspective. Despite its recent launch, The History Channel has over 17 million subscribers. According to a 1995 Beta Subscriber Survey, The History Channel leads all newer networks in interest (75%), and high interest (56%). 7/

6/ Out of the non-cable subscribers who are most likely to subscribe to cable, the highest number (47 percent) indicated an interest in The History Channel, according to an independent 1994 Beta Research Cable Non-Subscriber Study.

7/ *1995 Beta Subscriber Survey for The History Channel.*

The Courtroom Television Network ("Court TV"), the only television network devoted to in-depth coverage of legal issues, was launched on July 1, 1991 and reaches in excess of 25 million households. Court TV is a national cable network dedicated to live and taped coverage of courtroom trials and related legal proceedings from around the United States and abroad. Court TV provides trial coverage daily, anchored by a team of experienced legal journalists and supplemented by commentary and analysis from prominent attorneys. During prime time, Court TV features a live recap and analysis of the day's coverage and other breaking legal news on "Prime Time Justice," as well as other programs offering news, commentary and analysis on stories and issues concerning the law and the justice system

In addition to new, original programming that provides insight to viewers about the judicial system, Court TV has made a strong and tangible commitment to public affairs and educational programming. In assessing the educational value of the network, 84% of high school teachers believe it is important because it allows students to see the justice system in action, and 75% would recommend that their students watch Court TV. 8/ To meet its community responsibility and respond to these viewers, Court TV recently introduced "Teen Court TV," a three-hour programming block exploring the justice system from a young viewer's point of view. This new programming complements Court TV's contributions to schools through Cable in the

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8/ *National Survey of High School Teachers*, survey conducted for Court TV by Malarkey-Taylor, May, 1994

Classroom, and its ground-breaking telecast of the original Nuremberg Trials. Presently, Court TV is providing live coverage of War Crimes Trials at the Hague.

NBC Cable owns and operates two cable programming networks, CNBC and America's Talking. CNBC, a 24-hour consumer news and business service which was launched in 1989, reaches 56 million subscribers. America's Talking was launched in July, 1994, and currently reaches approximately 17 million subscribers. America's Talking will be the basis for a 24-hour news, information and talk service that will launch on July 15, 1996. This new channel will feature a format of packaged news reports, live remotes, news programs, and analysis of breaking news.

Ovation, an arts cable network, was launched on April 21, 1996 to an estimated 400,000 households, and is expected to reach 3 million households within twelve months. The network gives viewers unprecedented access to performances of jazz, classical music, ballet, modern dance, opera, and drama; architectural landmarks and important exhibitions; and the inspired vision of artists, musicians and writers. Showcasing the finest in the visual and performing arts from across the country and around the world, Ovation features performance and documentary style programming, including occasional live telecasts of operas, dramas and musical performances.

Ovation was created in response to the large and growing national audience for the arts and the increasing public demand for quality television programming. According to a U.S. government study, 71% of all U.S. adults are

interested in increased arts participation. 9/ Arts-oriented programming serves the public interest, as demonstrated by the fact that 41% of all adults attended an arts exhibition or performance in 1992, compared to only 37% who attended sporting events during the same period. 10/ The network's mission is to meet the needs of the many viewers who expect more from television by providing programming that will enrich and educate with outstanding arts programming not available anywhere else.

B. Limits on Channel Capacity Are the Greatest Impediment to Increased Public Interest Programming

As these descriptions attest, each of the Programmers is committed to finding innovative new ways to serve the public. But as good as programming services have become, they cannot educate, inform or entertain subscribers they cannot reach. Consequently, the public interest benefits described by the Vice President and the Chairman are limited by the small number of available channels -- or, as in the case of the proposed leased access rules -- by the additional restrictions that would be imposed by regulation. These limitations not only constrain existing programming services, but also "[m]ore than 100 aspiring new cable networks are banking that they will scope those few coveted slots available on cable systems." 11/

9/ *Arts Participation in America*, survey conducted for the National Endowment for the Arts by the U.S. Census Bureau, 1992.

10/ *Id.*

11/ "New Networks Square Off," *Multichannel News*, Nov. 20, 1995, p. 3.

As the Commission's own findings indicate, existing channel capacity has been dramatically overwhelmed by this explosion of cable programming options. 12/ For instance, the percentage of cable systems with the capacity to offer 30 or more channels inched from 77% to 78% from 1993 to 1994 In contrast, the number of cable programming choices during the same period skyrocketed, as the number of programming networks increased from 101 to 128, an increase of over 26%. 13/ This channel capacity squeeze is expected to tighten In its *1995 Competition Report*, the Commission anticipated 18 additional programmers by the end of 1995, and noted that 62 more had announced plans to launch after 1995. 14/ These expectations have been realized. Since May 1995, 97 new cable networks have launched. 15/ At the same time, the lack of channel capacity has relegated these new services to an "endangered species list." 16/

In time, there should be sufficient channel capacity for all proposed programming services. Through digital compression, cable operators and other MVPDs

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12/ *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* FCC 95-41, CS Docket No. 95-61 (1995) ("*1995 Competition Report*") at ¶ 17.

13/ *Id.* at ¶ 19.

14/ *Id.*

15/ *See* "Rookies and Wanna-bes: The New Cable Networks," *Broadcasting & Cable*, April 29, 1996, p. 64.

16/ *See* "New Networks Fight For Space," *Broadcasting & Cable*, April 29, 1996, p. 61.

will be able to provide "shelf space" for hundreds of programming services. But the much-touted 500-channel system exists today only as a technical possibility -- not yet as a reality. 17/ Until that day comes, however, it is imperative that the Commission fashion policies to protect programming services, and to provide incentives for cable operators to add new channels in order to provide more diverse choices to consumers.

This balance provides the public interest calculus at the heart of this proceeding: Rules that encourage quality cable programming networks serve the public interest; policies that restrict channel capacity, threaten to bump existing programmers or impede new launches do not serve the public interest. It really is that simple.

II. BACKGROUND ON THE LEASED ACCESS RULES

A. Current Leased Access Rules and The Commission's Proposed Formula

1. The Highest Implicit Fee Approach

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") 18/ required the Commission to determine the maximum reasonable rates that a cable operator may impose for leased commercial access. The Commission initially sought comments on four alternative basic methodologies including

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17/ In a recent survey, only 7.8 percent of systems surveyed indicated that they would expand channel capacity through digital compression technology within the next year. "History Has Cable Future," *Broadcasting & Cable*, April 22, 1996, p. 47.

18/ Pub.L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521 *et seq.* (1992). The 1992 Cable Act amends Title 6 of the Communications Act, 47 U.S.C. § 521 *et seq.*

a "benchmark" approach, a cost-of-service approach, a marketplace approach and a system of preferential rates. 19/ After reviewing the comments filed and noting the absence of an existing market for leased access, the Commission adopted in *Report and Order and Further Notice of Proposed Rulemaking* ("*Rate Order*") 20/ a "highest implicit fee" approach to establish a maximum reasonable leased access rate.

Under this system, the implicit fee is calculated by first subtracting the amount per subscriber the operator pays the programmer from the price per channel each subscriber pays the cable operator, and then multiplying this difference by the percentage of subscribers who can receive the programmer's service. 21/ The maximum rate that an operator can charge a leased access provider is the highest net implicit fee that the operator charged an unaffiliated programmer during the previous calendar year in a given programming category. 22/ The three programming categories are (1) programming charged on a per-event or per-channel basis; (2) programming more than 50% of the capacity of which is used to sell products directly to customers; and (3) all other programming. 23/

19/ *Notice of Proposed Rulemaking in Docket 92-266,* 8 FCC Rcd 510, 541-542 (1992).

20/ MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993).

21/ 47 C.F.R. § 76.970(c).

22/ 47 C.F.R. § 76.970(d).

23/ 47 C.F.R. § 76.970(f).

The Commission chose the highest implicit fee methodology on the basis that in using this rate "'the price . . . of such use will not adversely affect the operation, financial condition or market development of cable systems and will still enable commercial leased access to become the source of program diversity and of competition to cable operators that Congress intended it to be." 24/ At the same time, the Commission expressly rejected a cost-of-service methodology for calculating leased access rates, noting the costliness of using such an approach, and the possibility "*that substantial migration will occur under this approach, with uncertain and possibly harmful effects on the structure of the industry.*" 25/ The Commission further noted that its adoption of the highest implicit fee approach was a first step until it gained more experience in this area, and that due to the small response on leased access issues, it would refine its approach through the rulemaking and adjudicatory processes. 26/

2. The FCC's Proposed Hybrid Cost-Based/Market-Based Approach

The FCC's *Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Order and Further Notice*" or the "*NPRM*") 27/ in this proceeding is a

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24/ *Rate Order* at ¶ 515 (citing Communications Act of 1934, as amended ("Communications Act"), Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1) (footnote omitted).

25/ *Rate Order* at ¶ 513 (emphasis added).

26/ *Rate Order* at ¶¶ 491, 515.

27/ FCC 96-122, MM Docket No. 92-266 (March 29, 1996).

response to ten petitions for reconsideration of the commercial leased access rules adopted in the *Rate Order*. The petitioners included home shopping services and other leased access programming interests who complained that the highest implicit fee produced prohibitively high rates, and cable operators, some of whom argued that leased access rates did not allow operators to recover their costs and underestimated the value of services to subscribers. On the basis of these petitions and oppositions filed thereto, and without undertaking any further examination of the diversity or accessibility of the leased access market or initiating any other rulemaking process, the Commission has now proposed a hybrid cost-based/market-based maximum rate formula.

The cost-based part of the formula would apply where the leased access channel capacity set-aside has not been fully utilized by unaffiliated programmers. It would establish a maximum rate based on selected costs of cable operators. Specifically, the FCC proposal would require operators to take the following steps to determine their leased access rates: (1) designate which channels would be bumped to make room for leased access programmers; (2) determine per-channel costs for designated access channels; 28/ and (3) average the per channel costs for all designated channels. The determination of costs to be included in this formula is

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28/ The cable operator would add average monthly subscriber revenues for the tier on which the programming is carried to the per-subscriber, per-month "net opportunity costs" for the channel (lost advertising revenues and lost commissions, minus license fees that otherwise would have been paid by the cable operator), and divide that sum by the number of subscribers to the tier.

rooted in their ease of measurement, rather than their marketplace value. 29/ Among those costs which are not included in the proposed rate formula are certain opportunity costs such as loss of subscribership to a tier because valued programming was dropped. 30/

Once the set-aside quota has been filled, the FCC's proposal would permit the cost-based maximum rate to be replaced by a "market" rate. That is, as long as the set-aside quota is filled, the operator would be allowed to negotiate a higher rate with leased access programmers. 31/ If the amount of leased access programming drops below the set-aside quota, the maximum rate would again be determined by the cost formula. 32/ There is no explanation as to how the fluctuation above and below the quota will affect the negotiation dynamic

B. The FCC's Proposal is Predicated on the Sacrifice of Existing, Diverse Cable Programming Services

The *NPRM* makes clear that "operators would be forced to bump existing programming in order to accommodate a leased access request." 33/ Indeed, one of the more striking features of the proposal is the requirement that operators create "hit

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29/ *See, e.g., NPRM* at ¶ 79 ("[S]ome costs are not easily quantified; others the Commission does not believe are appropriate to include in the leased access fee.")

30/ *Id.* at ¶ 86.

31/ *Id.* at ¶ 96.

32/ *Id.* at ¶ 97.

33/ *Id.* at ¶ 99.

lists" by designating those programming services to be dropped as leased access requests come in. 34/ This list of designated services would be required to remain in place for at least one year. In short, the underlying presumption of the proposal is that existing programming services will be sacrificed, that the victims must be named in advance in cable systems across the country and that these choices are locked in by regulation. This is tantamount to creating a "death row" for existing cable programming services, which would impair the named services' ability to attract viewers, advertisers, investors and quality programming from third-party suppliers. Even if the named services were not bumped, the threat of being dropped would significantly impair their ability to compete. The wholesale sacrifice of new and existing cable programming services is not what Congress had in mind when it adopted leased access requirements. 35/ Indeed, it expressly drafted the law in 1984 to avoid such an outcome. Congress stressed that if "full compliance with the required set-aside . . . would necessitate removing cable services being provided to subscribers . . . , then the cable operator is not required to remove such services." 36/ Congress intended that cable operators comply with the set aside requirement as channel capacity became

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34/ *Id.* at ¶ 76.

35/ Cable Communications Policy Act of 1984 ("1984 Cable Act"), Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq.*

36/ COMMITTEE ON ENERGY AND COMMERCE, FRANCHISE POLICY AND COMMUNICATIONS ACT OF 1984, H.R. REP. NO. 934, 98th CONG., 2D SESS. (1984) ("1984 House Report") at 49. *See* 47 U.S.C. § 532(b)(1)(E).

"available." 37/ Although the express terms of Section 612(b)(1)(E) apply to the implementation of leased access immediately following adoption of the 1984 Act, the public interest philosophy underlying the provision should guide the Commission's implementation of the 1992 Cable Act: First, Commission rules and policies should not require cable operators to remove existing services or forego new services subscribers desire. Second, any transition to more rigorous leased access requirements should be phased in as cable systems add additional channel capacity. By sharp contrast, the Commission's current presumption that existing services must be sacrificed, and new services be threatened, is irreconcilable with this congressional policy.

III. THE COMMISSION SHOULD NOT ADOPT LEASED ACCESS RULES THAT ARE INCONSISTENT WITH ITS OVERALL POLICY GOALS

When Congress adopted leased access requirements as part of the 1984 Cable Act, it did so to "foster the availability of a 'diversity of viewpoints' to the listening audience." 38/ This statutory goal, however, must be viewed in its broader context. Congress did not adopt leased access requirements as an end in themselves and was quite clear in stating that leased access should not disrupt the cable industry or harm existing networks. Instead, Congress viewed leased access as simply one way to enable diverse programming services to flourish

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37/ *Id.*

38/ *Id. at* ¶ 31.

By every conceivable measure, that goal has been met (even if leased access has not played a significant role). Since 1984, when leased access was conceived, the number of programming services available to cable operators has multiplied between five and six times. 39/ As noted above, such growth in programming services is continuing, subject to the limits of channel capacity.

Federal regulation has been designed to take advantage of such growth, not to undermine it. This is particularly true of leased access requirements, in which Congress directed the FCC to balance any obligations with their effect on the cable industry. Rigid, quota-based requirements for leased access would be inconsistent with this philosophy. Even rate regulation of cable services has been implemented in a way calculated to avoid harming the growth and development of cable networks. Since the 1992 Cable Act, the FCC has monitored the industry's experience with rate regulations, and modified its rules where necessary to encourage cable operators to offer new, diverse services and, at the same time, preserve existing services. Any new rules to bolster leased access requirements should reflect the same public interest balance.

A. Congress Intended Leased Access Requirements to be Compatible With the Financial Health of Cable Operators and the Growth of Cable Networks

In the 1984 Cable Act, Congress established the first comprehensive federal system for regulating multichannel video services. At that time, cable television

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39/ *Compare* Television & Cable Factbook, Vol. 53, pp. 195-200 (1984) *with* Television & Cable Factbook, Vol. 64, pp. H121-H130 (1996).